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June 30, 1999

Mary Cottrell, Secretary  
Department of Telecommunications and Energy  
100 Cambridge Street  
Boston, Massachusetts 02202

Re: Proposed Anti-Slamming Rules Pursuant to G.L. c. 93, §§ 108-113, DTE 99-18

Dear Secretary Cottrell:

Enclosed, please find the Attorney General's Initial Comments in the above-referenced proceeding.

Thank you for your attention to this matter.

Sincerely,

Daniel Mitchell  
Assistant Attorney General  
Regulated Industries Division  
200 Portland Street, 4th Floor  
Boston, MA 02114  
617-727-2200

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COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

)

Rulemaking to Implement the )

Massachusetts Anti-Slammings Law, ) D.T.E. 99-18

St. 1998, c. 327 )

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#### INITIAL COMMENTS OF THE ATTORNEY GENERAL

On June 10, 1999, the Department of Telecommunications and Energy ("Department" or "DTE") issued an order instituting a rulemaking to implement the provisions of St. 1998, c. 327, an Act Protecting Consumers from the Unauthorized Switching of Their Local And Long Distance Telecommunications Service Providers (the "Anti-Slammings Law"). (1) In particular, the Department proposed and sought comment on new rules governing: (1) the conduct of third party verification calls and recordings to protect against incorrect, inaccurate or falsified verification; (2) an alternative informal procedure for the resolution of customer complaints regarding slamming; and (3) record keeping in connection with slamming complaints. The Department also proposed an application form for use by TPV companies in satisfaction of the requirement that they register with the Department. The Attorney General has reviewed the Department's proposed rules and regulations and hereby submits his comments.

While the Attorney General believes that the rules proposed by the DTE are consistent with and provide an appropriate implementation of the terms of the Anti-Slammings Law, he submits that the proposed regulations governing an informal procedure for the resolution of slamming complaints are unnecessarily detailed and that the flexibility necessary to facilitate an informal resolution of such complaints would be better provided by a much simpler provision. In particular, as proposed, 220 C.M.R. 13.05 may impose unnecessary constraints on an informal process intended to provide the Department with the necessary flexibility to efficiently facilitate mutually agreeable resolutions of complaints without resort to the formal processes set forth in the statute. (2) The Attorney General submits that the proposed terms addressing "Customer Responsibility," "Department Responsibility" and "Sanctions" in the context of the informal procedure are not necessary and, in fact, unnecessarily constrain the Department.

In place of the proposed terms of 220 C.M.R. 13.05, the Attorney General submits

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that the substitute language set forth below would provide a more appropriate degree of flexibility while at the same time requiring reasonable expedition and maintaining explicit Department oversight of the process. (3) In addition to eliminating unnecessary specificity concerning the acquisition of information by the Department and the remedial actions that may be adopted, the substitute language better tracks the language of the statute, imposes a reasonable time limit on the duration of the alternative procedures, and makes explicit the necessity of Department approval of any informal resolution. The latter feature of the substitute language should result in the Department having the same ability to require penalties as part of the informal procedures as it would have under the proposed rule.

### 13.05: Informal Procedure For The Resolution of Complaints

(1) Election by Customer of An Alternative Informal Procedure For The Resolution of Complaint. For any matter relating to the unauthorized changing of a customer's primary IXC or LEC, a customer may file a complaint with the Consumer Division of the Department and elect an alternative informal procedure for the resolution of the complaint.

(2) Informal Procedure For The Resolution of Complaints. For any matter relating to the unauthorized changing of a customer's primary IXC or LEC, where a customer has elected an alternative informal procedure for the resolution of the complaint, the Department shall, in consultation with the customer and the IXC or LEC that initiated the change, determine whether there exist mutually acceptable terms upon which the complaint can be resolved in a manner acceptable to the Department in consideration of the nature, circumstances and gravity of the respondent's conduct, degree of culpability and history of prior offenses. If mutually acceptable terms are not identified and approved by the Department within 90 days from the customer's election of an alternative dispute resolution procedure, the complaint shall be processed in accordance with the procedures set forth in G.L. c. 93, § 110.

(3) Sanctions. The Department may, in consideration of the nature, circumstances and gravity of the respondent's conduct, degree of culpability and history of prior offenses, impose a civil penalty on an IXC or LEC as a condition of an acceptable informal resolution of a complaint.

The Attorney General urges the Department to adopt the suggested change to the proposed anti-slamming rules and regulations.

Respectfully submitted,

THOMAS F. REILLY  
ATTORNEY GENERAL

By:

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1. The Massachusetts anti-slamming law went into effect on December 10, 1998. G.L. c. 93, §§ 108-113. It provides Massachusetts consumers protection from unauthorized changes of their local or long distance telecommunications carrier. A change in a customer's primary local or long distance telecommunications carrier can be authorized only through: (1) a signed letter of authorization (LOA); (2) recorded third party verification (TPV); or (3) such other third party verification method as may be found by the Department to provide a level of protection against slamming that is the equivalent to that provided by a TPV recording.

2. In another respect, however, it is important to note that the proposed terms of 220 C.M.R. 13.05(1)(b) appear to contravene directly the express requirements of G.L. c. 93, § 112(a) by providing too much flexibility to the Department. In particular, the Anti-Slamming Law provides that certain mandatory remedial actions are to follow a determination that an unauthorized change of the customer's primary IXC or LEC has occurred, but the proposed regulations purport to make those remedial actions discretionary. Compare G.L. c. 93, § 112(a) ("If the department determines that . . . the department shall calculate and require the new IXC or new LEC to refund the following . . .") with proposed 220 C.M.R. 13.05(1)(b) ("If the Department determines that an authorized change . . . the Department may"). See *Commonwealth v. Cook*, 426 Mass. 174, 180 (1997) ("The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation" and is "inconsistent with the idea of discretion."). To the extent that the Department does not adopt the substitute language proposed by the Attorney General for the 220 C.M.R. 13.05, it should at least insert the word "shall" in place of the word "may" in first sentence of 220 C.M.R. 13.05(1)(b).

3. Attached is a edited version of the of the DTE's proposed rules including the changes recommended here.